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No. 88-1029

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

YONKERS RACING CORPORATION, PETITIONER

v.

CITY OF YONKERS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
JAMES P. TURNER
Acting Assistant Attorney General
DAVID K. FLYNN
LINDA F. THOME
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTIONS PRESENTED

1. Whether the federal district court had authority to order the City of Yonkers to remove a state court proceeding that challenged implementation of the federal court's decree previously entered against the City.

2. Whether the City of Yonkers, in initiating condemnation proceedings against petitioner's property, complied with the requirements of state law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 858 F.2d 855. The pertinent orders and opinions of the district court contained in petitioner's appendix are unreported: oral opinion denying petitioner's motion to remand to state court, June 8, 1988 (Pet. App. 43a-44a); oral opinion denying petitioner's state law challenge to condemnation proceeding, June 8, 1988 (Pet. App. 47a-50a); order denying petitioner's state law challenge to condemnation proceeding, June 13, 1988 (Pet. App. 51a-57a).

JURISDICTION

The judgment of the court of appeals was entered on September 22, 1988. The petition for a writ of certiorari was filed on December 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. After more than 90 days of trial in 1983 and 1984, the United States District Court for the Southern District of New York issued an opinion on November 20, 1985, holding the City of Yonkers (City) liable for a pattern and practice of intentional racial discrimination in the selection of sites for public and subsidized housing, in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. 3601 *et seq. United States* v. *Yonkers Bd. of Educ.*, 624 F. Supp. 1276, 1289-1376 (S.D.N.Y. 1985). The court found that the City had deliberately concentrated virtually all of its public and subsidized housing in the southwest quadrant of Yonkers in order to maintain racial segregation.

Following remedial proceedings, on May 28, 1986, the district court entered its "Housing Remedy Order" that required the City to take a number of actions designed to facilitate the development of public and subsidized housing outside of Southwest Yonkers. *United States* v. *Yonkers Bd. of Educ.*, 635 F. Supp. 1577 (S.D.N.Y. 1986). Part IV of the Order required the City to designate sites for 200 units of public housing in East Yonkers (*id.* at 1580-1581).[1] The City, however, refused to designate any

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[1] The City had previously committed itself to provide such public housing sites as a condition of receiving Community Development Block Grant funds from the federal government. Under a consent decree entered by the district court in 1984 between the United States Department of Housing and Urban Development (HUD) and the class plaintiffs, represented by the Yonkers Branch of the National Association for the Advancement of Colored People (Yonkers NAACP), HUD would provide the funding for the public housing. 635 F. Supp. at 1580.

Part VI of the Order also required the City, by November 1986, to develop and implement a plan, known as the Long Term Plan, for the

appropriate public housing sites. Indeed, the City took "no significant action to comply with the 1986 Housing Remedy Order" for the first year and a half after its entry. *United States* v. *City of Yonkers,* 856 F.2d 444, 448 (2d Cir. 1988), petitions for cert. pending, Nos. 88-554, 88-555, 88-556, and 88-870.[2]

The City appealed the district court's orders, although implementation of the Housing Remedy Order was not stayed. In a lengthy opinion, the court of appeals affirmed the district court's orders "in all respects," concluding that the district court "properly applied the appropriate legal principles, that its findings of fact [were] not clearly erroneous, and that its remedial orders [were] within the proper bounds of discretion." *United States* v. *Yonkers Bd. of Educ.,* 837 F.2d 1181, 1184 (2d Cir. 1987), certs. denied, Nos. 87-1632 and 87-1686 (June 13, 1988). The

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creation of assisted housing, other than public housing, outside of Southwest Yonkers. 635 F. Supp. at 1582.

[2] The City's recalcitrance was not limited to the public housing sites. The City also refused to submit any proposal for the Long Term Plan. In 1986, after the City had refused to submit a Long Term Plan proposal, the United States moved to have the City held in contempt. The Yonkers NAACP, representing the class plaintiffs, meanwhile moved for the appointment of a special master to carry out the City's responsibilities under the Housing Remedy Order. The district court permitted the City to avoid contempt sanctions only after the City agreed to hire an Outside Housing Advisor to assist it in carrying out the Housing Remedy Order. Nonetheless, throughout 1987, the City continued to frustrate the court's and the plaintiffs' efforts to implement that order. *United States* v. *City of Yonkers,* 856 F.2d 444, 448-449 (2d Cir. 1988), petitions for cert. pending, Nos. 88-854, 88-855, 88-856, and 88-870. In fact, as the history of this litigation shows, the City acted constructively only when threatened with contempt. See, *e.g., United States* v. *Yonkers Bd. of Educ.,* 662 F. Supp. 1575 (S.D.N.Y. 1987); *United States* v. *Yonkers Bd. of Educ.,* 675 F. Supp. 1407, 1410 (S.D.N.Y. 1987); *United States* v. *Yonkers Bd. of Educ.,* 675 F. Supp. 1413, 1414 (S.D.N.Y. 1987).

court of appeals found that the entire Housing Remedy Order was "closely tailored to the City's constitutional violations," and specifically noted that the Order's public housing provisions were "plainly reasonable" (*id.* at 1236).

2. In January 1988, following the court of appeals' affirmance of the district court's orders, the parties negotiated the "First Remedial Consent Decree in Equity" (Consent Decree), which set forth the actions the City would take to comply with Part IV (public housing) and Part VI (Long Term Plan) of the Housing Remedy Order. After approval by the Yonkers City Council, the district court entered the decree as a consent judgment on January 28, 1988. Pet. App. 3a; *City of Yonkers,* 856 F.2d at 448.

The Consent Decree, among other things, renewed the City's commitment to build 200 units of public housing in East Yonkers and designated seven sites for that housing.[3] The Decree also obligated the City, if necessary, to initiate eminent domain proceedings within 60 days to acquire the four privately owned sites. Petitioner, Yonkers Raceway Corporation, owned one of those sites, a 1.2 acre parcel known as the "Clark Street" or "Raceway" site. Petitioner used that property as a parking lot. Pet. App. 3a, 6a.

3. On April 22, 1988, nearly one month after the deadline set in the Consent Decree,[4] the City, acting under

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[3] During extensive proceedings before the district court, the City's independent planning experts, the City's Community Development Agency, the court-appointed Outside Housing Advisor, the Municipal Housing Authority, and HUD reviewed the suitability of all seven sites (Pet. App. 22a-24a, 53a-54a). HUD reported to the district court that each site appeared to meet the federal government's site and neighborhood standards for public housing (*id.* at 23a); see 24 C.F.R. 941.202 (1988).

[4] Despite its express approval of the Consent Decree, the City sought to avoid compliance. On March 21, 1988, the City moved to modify the Decree. It even promised to return nearly $30 million in

court order and threat of contempt, initiated a condemnation action in the New York State Supreme Court to acquire petitioner's Raceway site under the state Eminent Domain Procedure Law (EDPL), N.Y. Em. Dom. Proc. Law §§ 101 *et seq.* (McKinney 1979) (Pet. App. 3a, 7a). On May 18, petitioner initiated a separate proceeding in the state trial court against the City, under Article 78 of the New York Civil Practice Law and Rules (CPLR), N.Y. Civ. Prac. L. & R. §§ 7801 *et seq.* (McKinney 1981), in which it sought to prevent the City's condemnation of the Raceway site (Pet. App. 70a-78a).

In that "Article 78 proceeding," petitioner alleged that the City had not complied with the notice, public hearing, and determination and findings requirements of Article 2 of the EDPL, N.Y. Em. Dom. Proc. L. §§ 201 *et seq.* (McKinney 1979) (Pet. App. 72a-75a), and had not con-

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federal funds if it was relieved of its duty to allow the development of public housing in white neighborhoods. See *United States* v. *City of Yonkers,* 856 F.2d at 449. The district court denied the City's motion on March 31, 1988. As a result, the City refused either to continue the Long Term Plan negotiations required by Section 18 of the Consent Decree, or to enact the zoning legislation required by Section 17 of the Decree. *Id.* at 449-450.

Undaunted, the City, on May 2, 1988, moved to vacate the Consent Decree in its entirety on the ground that the Archdiocese of New York (owner of St. Joseph's Seminary and College, a small part of which had been designated as a public housing site) had withdrawn its initial consent to the use of its property and no longer supported the Decree. The district court denied the motion and the City sought no further review of that ruling. Pet. App. 7a-8a, 11a & n.1.

The City ultimately enacted the zoning legislation required by the Consent Decree only after the district court held the City in contempt and imposed per diem fines on recalcitrant City Council members and escalating per diem fines on the City itself approaching $1 million per day of noncompliance. See *United States* v. *Yonkers,* 856 F.2d at 449-452; U.S. Br. in Opp. 10, *Spallone* v. *United States,* Nos. 88-854, 88-855, 88-586, and 88-870.

ducted the environmental assessment studies required by the New York State Environmental Quality Review Act (SEQRA), Environmental Conservation Law (ECL), N.Y. Envtl. Conserv. Law §§ 8-0101 *et seq.* (McKinney 1984), before initiating the condemnation action (Pet. App. 75a-77a). In a supporting affidavit, petitioner contended that the location of the Raceway site rendered it unsuitable for public housing, and that the site's designation for public housing was therefore "ridiculous" and "arbitrary and capricious" (Affidavit in Support of Article 78 Petition 8 (May 18, 1988), *Yonkers Raceway Corp.* v. *City of Yonkers,* No. 7168/88 (N.Y. Sup. Ct.)).[5] After alleging both violations of state law and the denial of "the right to due process," the Article 78 petition sought a declaratory judgment holding the City's proposed condemnation "unconstitutional, illegal, null and void," an injunction barring the City "from taking any action to acquire [the Raceway site]," and an order dismissing the entire condemnation proceeding (Pet. App. 77a-78a).[6]

4. On May 26, 1988, the United States requested the district court, under the All Writs Act, 28 U.S.C. 1651, to issue an order to show cause why the City should not be

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[5] Petitioner also alleged that the Long Term Plan aspects of the Consent Decree—which did not even involve its property or the City's condemnation action—failed to comply with state environmental law (Pet. App. 76a-77a).

[6] The City had also initiated a condemnation action in the state trial court to acquire a portion of land designated as a public housing site that was occupied by St. Joseph's Seminary and College and owned by the Archdiocese of New York. In response, the Seminary instituted an Article 78 proceeding in the state trial court which challenged the City's condemnation action. The Seminary raised many of the same issues as petitioner, and also challenged the City's condemnation under the Free Exercise Clause of the First Amendment. Pet. App. 3a-4a, 8a.

required to remove the Seminary's pending Article 78 proceeding in the state trial court (Pet. App. 8a; C.A. App. 4a-16a).[7] The district court held a hearing on May 27, at which the United States and the class plaintiffs learned for the first time of petitioner's similar Article 78 proceeding pending in the state trial court. The Yonkers NAACP accordingly asked the district court to amend the motion filed by the United States to include an order directing the City to remove that proceeding as well. Without objection, the district court deemed the motion amended. C.A. App. 300a-302a, 304a, 313a.

At the conclusion of the May 27 hearing, the district court granted the motion to show cause and directed the City to remove petitioner's and the Seminary's pending Article 78 proceedings and to file such petitions by May 31, 1988 (Pet. App. 8a-9a; C.A. App. 307a). The court made clear, however, that the underlying condemnation actions, which involved valuation of the condemned sites, would not be removed and would remain in state court (C.A. App. 305a).

The court first observed (C.A. App. 305a) that

> [d]uring the informal discussions which preceded entry of the consent decree, the question was raised whether [the] condemnation proceedings should be commenced in [the district] court or in state court. It was then the understanding of the parties that the sole issue which would be present in the condemnation proceedings related to value, that is, the amount to be paid to the property owner whose land was con-

[7] "C.A. App." refers to the Joint Appendix filed with petitioner's brief in the court of appeals. The United States made clear that the underlying condemnation actions filed in state court, which would determine the value of the condemned sites, should not be removed to federal court (C.A. App. 262a-263a).

> demned by the City of Yonkers in implementation of the housing remedy order. It was with that understanding and intention that the consent decree did not contain a provision requiring that the condemnation proceedings go forward in [the district] court * * *.

The court then found that if removal were not ordered, "there is a significant risk that the City of Yonkers [would] be confronted with inconsistent orders from two courts, that is, from an order of [the district] court to proceed with the condemnation of the two properties, and an order of a state court either not to proceed with that condemnation or to proceed pursuant to procedural regulations and a timetable which would be inconsistent with [those] established by [the district] court" (*id.* at 305a-306a).

Noting that the All Writs Act should be used only as "a last resort" to remove state court proceedings to federal court, the court concluded that the Act clearly applied where, as here, "the very subject matter of the consent decree is at issue" (C.A. App. 306a). Accordingly, the court held that the "appropriate procedure" called for removing the Article 78 proceedings under the All Writs Act (*ibid.*).[8]

On May 31, the City complied and filed petitions for removal of the Article 78 proceedings (C.A. App. 17a-27a).[9]

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[8] The district court also entered an order permitting the United States and the Yonkers NAACP to intervene in the removed Article 78 proceedings as respondents (Pet. App. 8a; C.A. App. 314a-315a).

[9] The Seminary later filed a motion in the district court to remand its Article 78 proceeding to state court. The district court denied that motion, concluding that the Seminary's Article 78 petition, which raised a First Amendment claim, was properly removed under 28 U.S.C. 1441, as well as under 28 U.S.C. 1443 and 1651 (Pet. App. 43a, 52a). The district court also dismissed the Seminary's petition on the merits (*id.* at 51a-57a). The court of appeals affirmed the district court's removal of the Seminary's petition, but vacated and remanded

Petitioner then filed in the district court a motion to remand the Article 78 proceeding to the state trial court, contending that "the case was removed * * * improvidently and without jurisdiction by a party lacking the capacity of a defendant, and that [the court] lacks jurisdiction over the subject matter of [the] proceeding * * * *" (*id.* at 166a-167a).

5. After a hearing on June 8, the district court denied petitioner's motion to remand (Pet. App. 43a-44a). It found that the Article 78 proceeding was "an integral part of the efforts by a federal court to grant a remedy to the civil rights violations found to exist" (*id.* at 43a). The court therefore concluded that removal was necessary and proper under 28 U.S.C. 1443 and 1651[10] in order to ensure the

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the court's dismissal of the Seminary's First Amendment claim (*id.* at 14a-19a, 25a-35a). On remand, the district court entered an order removing the Seminary's property as an available site for public housing and substituting an alternative site, known as the Gramercy site. *United States* v. *Yonkers Bd. of Educ.*, No. 80 CIV 6761 (S.D.N.Y. Oct. 25, 1988), slip op. 4. Accordingly, the issues surrounding the district court's removal of the Seminary's Article 78 proceeding are not presented here.

[10] The civil rights removal statute, 28 U.S.C. 1443, provides in pertinent part:

> Any of the following civil actions * * *, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> * * * * * *
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

The All Writs Act, 28 U.S.C. 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

"implementation of a federal civil rights remedial order" (Pet. App. 43a), and to eliminate the "prospect of inconsistent decrees" (*id.* at 44a). The court reiterated that the "condemnation proceeding initiated in the [state court] pursuant to the consent decree continues in that court" (*ibid.*).[11]

After briefing and a hearing, the district court dismissed the Article 78 petition on the merits (Pet. App. 47a-57a). It found, contrary to petitioner's claim, that the City, "in a very real sense, *is* faced with an emergency" (*id.* at 52a-53a), and concluded that the process by which the public housing sites, including the Raceway site, had been identified, designated in the Consent Decree, and reviewed by HUD "satisfied the substance" of applicable state law (*id.* at 53a-54a). Finally, the court held that exemptions set forth in the EDPL and the SEQRA excused strict compliance with the notice, hearing, and review provisions of those statutes (*id.* at 53a-54a).

6. The court of appeals affirmed (Pet. App. 1a-42a). In rejecting petitioner's contention that the federal removal statutes are the exclusive sources of authority over removal,[12] the court of appeals recognized that petitioner is "in a position now—whether willingly or not—to frus-

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[11] The City opposed the removal order before the district court, but abandoned that challenge on appeal (Pet. App. 12a n.2).

[12] The court of appeals had "serious doubts * * * whether the removal statutes [28 U.S.C. 1441 and 1443] provided a proper basis to compel the City of Yonkers to remove the Article 78 proceedings to federal courts" (Pet. App. 13a-14a). The court recognized the general proposition that "a party who is in the position of a plaintiff cannot remove" (*id.* at 14a), and questioned whether the City could be treated as a defendant in the state court condemnation proceedings. Nevertheless, the court chose not to resolve the issue since it agreed with the district court that the All Writs Act was an independent source of authority for the action taken (*ibid.*).

trate implementation of the Consent Decree," and concluded that "this is just the sort of extraordinary circumstance envisioned by the All Writs Act" (*id.* at 15a). The court further observed that "removal was necessary to protect the integrity of the Consent Decree * * * because the issues raised by the Article 78 petitions cannot be separated from the relief provided by the Consent Decree" (*id.* at 18a). In sum, the court of appeals held "that because of the significant risk of inconsistent decrees from two courts, it was 'necessary and appropriate' for the district court to invoke the residual jurisdictional authority of the All Writs Act" (*id.* at 19a).

Addressing the merits of the Article 78 petition, the court of appeals agreed with the district court's ruling. It concluded that the City, under the particular circumstances, was exempt from compliance with the notice, hearing, and review requirements of the EDPL. In any event there was "substantial compliance" with those requirements (Pet. App. 22a), including a "valid determination that the proposed condemnations would be in the public interest" (*id.* at 23a). The court of appeals similarly held that the City's condemnation of petitioner's site was exempt from strict compliance with the SEQRA, and that the environmental assessment petitioner sought "is in fact taking place" (*id.* at 24a).[13]

7. On November 23, 1988, petitioner filed an application for a stay of the court of appeals' judgment (No. A-419). On November 28, Justice Marshall, sitting as Circuit Justice, denied that application. Petitioner then resub-

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[13] Judge Mahoney dissented (Pet. App. 36a-42a). He concluded that "[r]emoval is manifestly not warranted by [28 U.S.C. 1441 or 28 U.S.C. 1443]" (Pet. App. 38a), and that application of the All Writs Act "in the circumstances presented by this record was manifestly premature and improper" (*id.* at 42a).

mitted the application to the Chief Justice, who referred the matter to the Court. On December 5, the Court denied the application; the Chief Justice and Justice Kennedy dissented.[14]

ARGUMENT

The decisions below are correct. They do not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner principally contends (Pet. 7-15) that the district court lacked subject matter jurisdiction over the Article 78 state court proceeding challenging the City's condemnation of the Raceway site, that no specific removal statute authorized removal of that proceeding, and that the court of appeals therefore erred in holding

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[14] In the meantime, implementation of the original Housing Remedy Order and the Consent Decree has continued. The Consent Decree contemplated the issuance of a single request for proposals from developers (RFP), and the ultimate selection of a single development proposal for the construction of all 200 units of public housing on the seven sites. Because of the delays occasioned by substitution of the Gramercy site (see note 9, *supra*), and topographic problems with another designated site, the district court ordered the RFP process to proceed with respect to the remaining five sites, including petitioner's Raceway site. *United States* v. *Yonkers Bd. of Educ.*, No. 80 CIV 6761 (S.D.N.Y. Oct. 25, 1988), slip op. 4-5. By November 23, 1988, the state trial court had not yet acted to transfer title of those sites the City had condemned under the Consent Decree. Because such title transfers were prerequisites to the formal publication of the final RFP, the district court, on November 23, entered an order deeming title to have transferred for purposes of the RFP while valuation proceedings continued in the state court. *United States* v. *Yonkers Bd. of Educ.*, No. 80 CIV 6761 (S.D.N.Y. Nov. 23, 1988), slip op. 2. Following HUD's approval on December 5, 1988, the final RFP issued. Developers are currently preparing bids to construct 142 units of public housing on five sites, including petitioner's Raceway site.

that the district court could invoke the All Writs Act to order the City to remove. Contrary to petitioner's argument, however, the district court did have ancillary jurisdiction over the claims raised in the Article 78 proceeding, claims that directly threatened to thwart implementation of the federal court's decree to remedy the City's discrimination in public housing. If, as the court of appeals assumed, removal was unavailable under 28 U.S.C. 1441 or 1443,[15] the exceptional circumstances of this case warranted the district court's invoking its authority under the All Writs Act in order to ensure the orderly implementation of its decree.

a. Petitioner's categorical assertion that "[s]ubject matter jurisdiction is not present in this proceeding" (Pet. 7) is mistaken. Here, the Article 78 petition directly challenged a substantive provision of the Consent Decree—the designation and suitability of petitioner's Raceway site for the public housing needed to remedy the City's past discriminatory conduct. Petitioner contended that the location of the Raceway site rendered it unsuitable for public housing, and that the site's designation for public housing was therefore "ridiculous" and "arbitrary and capricious" (Affidavit in Support of Article 78 Petition 8 (May 18, 1988), *Yonkers Raceway Corp.* v. *City of Yonkers,* No. 7168/88 (N.Y. Sup. Ct.)). As relief, petitioner sought a declaratory judgment holding the City's proposed condemnation "unconstitutional, illegal, null and void," an injunction barring the City "from taking any action to acquire [the Raceway site]," and an order dismissing the condemnation proceeding (Pet. App. 77a-78a). In other words, petitioner plainly challenged substantive aspects of the Consent Decree and invoked the

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[15] But see note 17, *infra.*

state court's jurisdiction to interfere with that federal court order.

This Court has long recognized that a federal court "has jurisdiction of a bill ancillary to an original case or proceeding in the same court, whether at law or in equity, to secure or preserve the fruits and advantages of a judgment or decree rendered therein." *Local Loan Co.* v. *Hunt,* 292 U.S. 234, 239 (1934); see *Owen Equipment & Erection Co.* v. *Kroger,* 437 U.S. 365, 375-376 (1978); *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356, 365-367 (1921); *Freeman* v. *Howe,* 65 U.S. (24 How.) 450, 460 (1860). Thus in *Freeman* v. *Howe,* this Court stated that after property had been attached in a federal diversity action, claimants to that property could assert their interest by filing a bill in equity in the federal court; lack of diversity among the claimants would not be a bar, since the principle of ancillary jurisdiction was not limited to the parties to the original suit. See 65 U.S. (24 How.) at 460. Similarly, in *Ben-Hur,* this Court upheld ancillary jurisdiction over a federal court suit to enjoin the defendants from attempting to circumvent a federal decree in an earlier class action by commencing litigation in state court. In answer to the argument that the parties in the federal action were not diverse, the Court said: "an ancillary bill may be prosecuted from the same court to protect the rights secured to all in the class by the decree rendered" (255 U.S. at 367). As in *Ben-Hur,* petitioner's substantive claims in the Article 78 proceeding, which directly challenged the district court's decree, fell within that court's ancillary jurisdiction and could have been filed initially in federal court.[16]

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[16] The district court also had ancillary jurisdiction over petitioner's state law procedural claims. The City filed its condemnation petition on April 22, without having complied strictly with the formal notice and hearing requirements of the EPDL, only after the district court

b. For that reason, contrary to petitioner's contention (Pet. 12-13), this is not a case in which the district court invoked the All Writs Act to exercise federal jurisdiction that otherwise did not exist. Compare *Bath County* v. *Amy*, 80 U.S. (13 Wall.) 244, 249 (1871), and *Maczko* v. *Joyce*, 814 F.2d 308, 310 (6th Cir. 1987). Instead, the district court issued an order under the All Writs Act to protect its existing jurisdiction over the parties' implementation of the Consent Decree. Petitioner does not seriously dispute the findings of both the district court and the court of appeals that the Article 78 state court proceeding threatened to undermine the orderly implementation of the Consent Decree, and that the proceeding therefore should have been brought before the federal court. See Pet. App. 15a, 18a-19a, 43a-44a; C.A. App. 305a-306a. Indeed, petitioner does not challenge the district court's authority to order the City to remove the Article 78 proceeding provided removal was proper under 28 U.S.C. 1441 or 28 U.S.C. 1443. Rather, petitioner contends that where removal is unavailable under the specific removal statutes, the district court simply has no authority to issue an order to accomplish that result. Pet. 8-10.

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ordered it to comply with the Consent Decree immediately or face contempt (Pet. App. 3a, 7a).

The district court has followed the course of exercising ancillary jurisdiction, in the first instance, in another site owner's challenge to the Consent Decree. Celwyn Company, Inc., the owner of the substituted Gramercy site (see note 9, *supra*), sought to challenge the district court's designation of its property and moved to intervene in the ongoing original proceeding, *United States* v. *Yonkers Bd. of Educ.*, No. 80 CIV 6761 (S.D.N.Y.), under Rule 24 of the Federal Rules of Civil Procedure. After a hearing, the district court, on January 12, 1989, granted Celwyn Company's motion to intervene under Fed. R. Civ. P. 24(b), and permitted the site owner to assert its claims. Jan. 12, 1989 Tr. 11; Endorsement on Notice of Motion for Leave to Intervene as Party Plaintiff, *United States* v. *Yonkers Bd. of Educ.*, No. CIV 6761 (S.D.N.Y. Jan. 12, 1989).

Assuming that removal was unavailable under 28 U.S.C. 1441 or 1443,[17] the court of appeals correctly con-

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[17] Although unresolved by the judgment of the court of appeals, we contend that the City should properly be treated as a defendant for purposes of the "color of authority" clause of the civil rights removal statute, 28 U.S.C. 1443(2), and thus the district court had a specific basis in the removal statutes for the exercise of authority over the state court Article 78 proceeding. Under state law, an Article 78 proceeding is the vehicle for judicial challenge of the actions or determinations of state governmental bodies. See N.Y. Civ. Prac. L. & R. §§ 7801 and 7802 (McKinney 1981). That proceeding is separate and distinct from any answer filed in a condemnation action under the state Eminent Domain Procedure Law, N.Y. Em. Dom. Proc. Law § 402(B)(4) (McKinney 1979). Here, the Article 78 petition challenged the Consent Decree's designation of the Raceway site for public housing; the petition sought a declaratory judgment holding the City's proposed condemnation "unconstitutional, illegal, null and void," an injunction barring the City "from taking any action to acquire [the Raceway site]," and an order dismissing the entire condemnation proceeding (Pet. App. 77a-78a).

The Article 78 petition thus initiated a separate proceeding in which petitioner, by directly challenging the City's actions undertaken to comply with the federal court orders, cast the City as the respondent and/or defendant. Congress designed subsection (2) of the civil rights removal statute to permit removal from state court in precisely such a situation, *i.e.*, where "federal officers or agents and those authorized to act with or for them in affirmatively executing duties under any federal law providing for equal civil rights" are subject to challenge in state court. See *Greenwood* v. *Peacock*, 384 U.S. 808, 824 (1966); cf. *Burns* v. *Board of School Comm'rs*, 437 F.2d 1143, 1144 (7th Cir. 1971) (per curiam) (school officials permitted to remove state court action filed by teachers seeking to block transfers carried out under court-ordered school desegregation plan).

To be sure, in *Mason City & Fort Dodge R.R.* v. *Boynton*, 204 U.S. 570, 579-580 (1907), this Court held that in determining the removability of a diversity action under the predecessor to 28 U.S.C. 1441, only the condemnee in a state condemnation proceeding qualifies as the "defendant" entitled to remove under federal law. In other words, "the [condemnor] is the plaintiff, as the institution and

cluded that the All Writs Act, under these exceptional circumstances, authorized the district court to bring the state court proceeding within its jurisdiction. This Court "has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *New York Tel. Co.*, 434 U.S. 159, 172 (1977). "Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated * * * to achieve the ends of justice entrusted to it." *Adams* v. *United States*, 317 U.S. 269, 273 (1942). Thus in situations closely analogous to the present case, this Court has shown its willingness to use its authority under the All Writs Act. In those situations, matters pending in state or lower federal courts raised serious questions within this Court's jurisdiction, but raised them in a way that fell outside the Court's specific statutory authority to grant appellate review. See, *e.g.*, *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (writ of mandamus); *House* v. *Mayo*, 324 U.S. 42 (1945) (common-law writ of cer-

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continuance of the proceedings depend upon its will" (204 U.S. at 580). In the present case, unlike the action sought to be removed in *Mason City* (and in *Chicago, R.I. & P.R.R.* v. *Stude*, 346 U.S. 574 (1954)), the removed Article 78 proceeding was an entirely separate challenge to the City's conduct. Moreover, the narrow construction of "defendant" adopted under Section 1441, see *Shamrock Oil & Gas Corp.* v. *Sheets*, 313 U.S. 100, 104 (1941), would, if carried over to Section 1443(2), threaten to frustrate Congress's clear purpose of providing a federal forum for an official body which, like the City of Yonkers, is confronted with a state court challenge to the carrying out of a federal duty. For petitioner's state court challenge to the condemnation was exactly that: an effort to prevent the City from effectuating a federal injunctive decree.

tiorari); *United States Alkali Export Ass'n* v. *United States*, 325 U.S. 196 (1945) (common-law writ of certiorari).

In the removal statutes, which speak only to a defendant's ability to avail itself of federal court jurisdiction, Congress has not expressly restricted a federal court's power to protect its jurisdiction when the situation is one calling for a state court litigant to bring its case within that jurisdiction. Under those circumstances, the All Writs Act "is a residual source of authority to issue writs that are not otherwise covered by statute." *Pennsylvania Bureau of Correction* v. *United States Marshals Service,* 474 U.S. 34, 43 (1985). Here, if 28 U.S.C. 1443 was inapplicable (as the court below assumed), the district court had no means other than the All Writs Act with which to bring petitioner's Article 78 proceeding before it in order to ensure the orderly implementation of the federal remedial decree. Thus, contrary to petitioner's suggestion (Pet. 11-12), the district court's reliance on the All Writs Act was a far cry from the situation in *Pennsylvania Bureau of Correction,* where this Court expressly found that the federal habeas corpus statute "indisputably provides a district court with a means of [accomplishing its objective]" (474 U.S. at 43 n.7).[18]

c. Moreover, the extraordinary circumstances confronting the district court called for its using the authority embodied in the All Writs Act. The City's uncertain status in the pending state court proceeding, *i.e.*, as plaintiff in

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[18] In *Pennsylvania Bureau of Correction,* the Court concluded that since the federal habeas corpus statute, 28 U.S.C. 2243, specifically provided for the transportation of state prisoners to federal court by state prison authorities, the All Writs Act did not authorize a federal magistrate or a district court to issue an order requiring the United States Marshals Service to provide such transportation (474 U.S. at 40-43).

the condemnation action, but as respondent to the Article 78 petition, together with the City's rich history of recalcitrance in the entire *Yonkers* litigation and the risk that the state court proceeding would delay and even impede its long overdue compliance with the federal Housing Remedy Order,[19] are precisely the sort of "exceptional circumstances" that "clearly [show] the inadequacy of traditional [statutory process]," and therefore call for resort to the All Writs Act. *Pennsylvania Bureau of Correction,* 474 U.S. at 43. Accordingly, the court of appeals correctly upheld the district court's use of that statute.

2. Petitioner also asserts (Pet. 16-19) that both the district court and the court of appeals misconstrued New York state law in dismissing the Article 78 petition on the merits.[20] That contention does not warrant this

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[19] The court of appeals identified certain factors that amplified the district court's need to bring the Article 78 proceeding before it: the City's intransigent refusal to implement the Consent Decree voluntarily and the fact that the City would have been required to take positions in state court contrary to those it had taken in federal court. See Pet. App. 18a ("we have serious doubts whether a reluctant contemnor, which at every opportunity has resisted implementation of the Housing Remedy Order, could be counted on in state court to adequately protect the integrity of the Consent Decree").

[20] Contrary to petitioner's suggestion (Pet. 14-15), the courts below did not deprive it of an opportunity to raise its state law claims challenging the Consent Decree's designation of the Raceway site and the City's initiation of condemnation proceedings. On the contrary, the petition itself belies that contention since petitioner (Pet. i., 16-19) challenges in this Court the court of appeals' resolution of those very claims. Moreover, the courts below emphasized that petitioner could present in federal court all of the claims and arguments it could have raised in the state proceeding (Pet. App. 19a, 43a). And the record shows unmistakably that the district court and the court of appeals carefully considered all the state law claims petitioner asserted (*id.* at 19a-24a, 47a-48a, 51a-54a). See *Firefighters* v. *City of Cleveland,* 478 U.S. 501, 529 (1986). Finally, since the procedure petitioner contests

Court's review. *E.g., Haring* v. *Prosise,* 462 U.S. 306, 314 n.8 (1983) ("[S]tanding alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review."); *Butner* v. *United States,* 440 U.S. 48, 58 (1979) ("The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.").

Furthermore, the court of appeals correctly affirmed the district court's dismissal of the Article 78 petition. Both the record and applicable New York state law amply support the conclusions that the City, under the particular circumstances, was exempt from compliance with the procedural requirements of the EDPL. And, in any event, "there was substantial compliance with [those] requirements" (Pet. App. 22a), including a "valid determination that the proposed condemnations would be in the public interest" (*id.* at 23a). Moreover, the City's condemnation of petitioner's site was exempt from strict compliance with the SEQRA, and the environmental assessment petitioner sought under that statute "is in fact taking place" (*id.* at 24a).[21]

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here in fact enabled petitioner to attack the Consent Decree's designation of the Raceway site before the federal court that entered that order, this case does not, as petitioner asserts (Pet. 15), raise any issues relating to a nonparty's ability to challenge a consent decree. Compare *Martin* v. *Wilks,* Nos. 87-1614, 87-1639, and 87-1668 (argued Jan. 18, 1989).

[21] Petitioner's contention that "[t]here was absolutely no proof in the record" to support the court of appeals' conclusions (Pet. 19) is groundless. The record before the district court and the court of appeals included the recommendations of the Outside Housing Advisor, the submissions of the *Yonkers* parties on the merits of the sites recommended, and the results of HUD's review of the sites. In con-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
JAMES P. TURNER
Acting Assistant Attorney General
DAVID K. FLYNN
LINDA F. THOME
Attorneys

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trast, petitioner presented "no documentation" in the district court in support of its claim at oral argument there that its site was "essential to the operation of the Raceway" (Pet. App. 56a).

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